Magna Charta.[4] If, therefore, a particular procedure is not expressly or by implication forbidden by other parts of the Constitution, the fact that such procedure was a part of the English common or statute law at the time the Constitution was adopted is strong evidence that it is not a denial of "due process."[5] The present statute seems to fall in this class. True, a grand jury could not regularly inquire of a fact done outside the county for which it was sworn; but this rule was modified by some eighteen exceptions, the earliest of which date from Henry VIII.[6] Indeed, the statute in that reign which provided that counterfeiters, etc., might be indicted and tried for their offenses, committed in Wales, in the next adjoining county of England,[7] is exactly in point as to the present statute. Thus even if "due process of law" be taken to mean common law procedure at the time the Constitution was adopted, an extremely narrow construction, the present statute seems proper.

There is, it is true, some authority supporting the view just noted,[8] but the Supreme Court has taken one less rigid. Thus a state may substitute prosecution by information for prosecution by indictment,[9] and thereby eliminate the grand jury altogether. A simplified form of the indictment may be prescribed, so long as it charges the essential elements of the crime.[10] And even a provision for a petit jury of eight to try a felony is proper.[11] In state courts a provision for a grand jury of less than the common law number of jurors has been upheld.[12] It seems clear, therefore, that when the Constitution guaranteed to the citizen "due process of law," it did not crystallize the then common law procedure and adopt it as if such procedure had been specifically described. The provision leaves a wider scope. It was intended to protect the individual from the arbitrary exercise of the powers of government. But so long as the substantial rights of the citizen were not invaded, the forms by which he was to be protected might be modified to suit new conditions. So, even if the present statute were not proper as prescribing an ancient procedure, it seems clearly to fall within this general power.

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CONTRACT BY STATE NOT TO DISCRIMINATE AGAINST FOREIGN CORPORATIONS. — Though it is beyond the power of a state to bargain away its police power[1] or its right of eminent domain,[2] by a line of judicial decision, not without emphatic and persistent dissent, it may irrevocably restrict or part with its power to tax.[3] Whether such contract be by general law or by

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[4] Den d. Murray *v.* Hoboken, etc., Land Co., 18 How. (U. S.) 272; Davidson *v.* New Orleans, 96 U. S. 97.

[5] Den d. Murray *v.* Hoboken, etc., Land Co., *supra.*

[6] See 4 Bl. Com. 303.

[7] 26 Hen. VIII c. 6.

[8] Jones *v.* Robbins, 8 Gray (Mass.) 329.

[9] Hurtado *v.* California, 110 U. S. 516; McNulty *v.* California, 149 U. S. 645.

[10] Caldwell *v.* Texas, 137 U. S. 692.

[11] Maxwell *v.* Dow, 176 U. S. 581.

[12] People *v.* Parker, 13 Colo. 155; Hausenfluck *v.* Com., 85 Va. 702.

[1] Laclede Gas Light Co. *v.* Murphy, 170 U. S. 78. See Freund, Police Power, § 362.

[2] See Lock Haven Bridge Co. *v.* Clinton County, 157 Pa. St. 379.

[3] Home of the Friendless *v.* Rouse, 8 Wall. (U. S.) 430. See Judson, Taxation, §§ 39–58.

special, mutual assent and consideration must plainly appear.[4] There is the further rule, rigidly applied, that all fair doubts be resolved in favor of the state.[5] To foreign corporations a contract with the state is of vital interest. Unhampered by the "privileges and immunities" clause, a state may exclude them altogether,[6] may impose onerous conditions of admission,[7] may discriminate against them in tax or regulation,[8] and in so far as it does not deprive them of vested property or contract rights may revoke their licenses at will.[6] The law of foreign corporations is recent, and the cases are few where courts have passed upon their agreements with states. But it is in each case a question of fact, for determination from the enacting language and attendant circumstances, whether a revocable license has been granted[9] or a solemn contract made.[10] The United States Supreme Court has recently passed upon an interesting case of this nature. A New Jersey corporation, capitalized at one hundred millions, paid fifteen thousand dollars to enter Colorado under a statute providing that foreign corporations should be subject to "all the liabilities, restrictions and duties which are or may be imposed upon" similar domestic corporations and "have no other or greater power." This, by a bare majority, was held to constitute a contract not to discriminate against the foreign corporation, the obligation of which was impaired by a subsequent franchise tax double that imposed upon domestic corporations. *Am. Smelting & Refining Co.* v. *Colorado*, Jan. 7, 1907.

If, as Justice Peckham declares, the contract arose when the entrance fee was paid, subsequent expenditures in the state on the faith thereof, however large, formed no part of the consideration. Nor does a license necessarily become a contract because the fee exacted is large. And in considering the size of this fee the enormous capitalization here represented must be borne in mind. Granted, moreover, that the fee shows Colorado to have contracted not to revoke the license for twenty years (the statutory life of corporations) save for cause, it is another matter to spell out a contract to make no discrimination in favor of domestic corporations during that period. To say, "You shall have all the burdens and no greater privileges," would seem naturally to mean, "You shall never be better off," rather than, "You shall be neither better off nor worse off" than domestic corporations. At best there would seem to be a fair doubt, which by the general rule should be resolved in the state's favor.[5] And though, as the court points out, this contract is not one of tax-exemption, this rule still applies. Facts undisclosed in the opinion may have affected the decision of the majority.

Non-discrimination in "liabilities, restrictions and duties" includes police power as well as taxation. Conditions may be easily imagined where the public welfare would demand restrictions upon foreign corporations heavier than upon domestic corporations in the same line of business. Though such part of the contract might therefore be objectionable, the part as to

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[4] Grand Lodge *v.* New Orleans, 166 U. S. 143.

[5] Metropolitan Street Ry. Co. *v.* New York, 199 U. S. 1. See Am. Smelting & Refining Co *v.* People, 82 Pac. Rep. 531 (Colo.).

[6] Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28.

[7] Security Mutual Life Ins. Co. *v.* Prewitt, 202 U. S. 246.

[8] Southern Bldg. & Loan Ass'n *v.* Norman, 98 Ky. 294.

[9] Home Ins. Co. *v.* Augusta, 93 U. S. 116; Com. Mutual Life Ins. Co. *v.* Spratley, 172 U. S. 602.

[10] N. W. Telephone Exchange Co. *v.* Anderson, 12 N. D. 585; Com. *v.* Mobile & Ohio Ry., 64 S. W. Rep. 451 (Ky.). See Erie Ry. *v.* Pennsylvania, 153 U. S. 628.

taxation, though expressed in the same phrasing, could still stand.[11] While the four justices assign no reason for their dissent, it is fair, therefore, to assume that they could find no contract in fact.

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THE EXTENT OF THE PROTECTION AFFORDED THE DOWER RIGHT. — It has just been decided in Utah, apparently for the first time anywhere,[1] that a widow whose husband has conveyed away land without her consent cannot recover from his estate after his death the value of her dower in the land thus disposed of. *In re Park's Estate*, 87 Pac. Rep. 900. The case may be explained on the ground that she suffered no damage. But the reasoning on which the court proceeded — that dower rights are only against the land — suggests the question whether they are always so limited.

Dower was early considered a mere inchoate right, not so high as an interest in land.[2] But more recently many incidents of property have been given to it,[3] and now the decidedly prevalent view is that "it is a subsisting and valuable interest which will be protected and preserved."[4] The difficulty whether the interest will be extended beyond the land itself arises especially in two classes of cases: when a mortgage on the land is foreclosed, and when the land is put to a public use. As to the wife's rights when her interest in the land is destroyed by the foreclosure of a prenuptial mortgage, or of one in which she joined, a serious conflict exists. The widow's right to dower in an equity of redemption is now almost universally recognized,[5] though formerly it was otherwise.[6] But when the foreclosure takes place during the husband's life, at least three results have judicial sanction. Some courts give the wife no rights in the proceeds of the sale. It is argued that her joining in the mortgage interrupts, with her consent, the seisin of her husband, and without this seisin dower cannot exist;[7] also, that dower, being but an interest in the husband's title, is destroyed when that is defeated by the mortgagee's paramount title and turned into personalty.[8] These grounds[9] are rather technical, and so other courts, proceeding more on equitable considerations, give the wife a right in the surplus. They justly say that she had an interest in the equity of redemption, and when this is changed into money, her interest should attach

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[11] Mayor of Hagerstown *v.* Dechert, 32 Md. 369.

[1] See Miller *v.* Farmer's Bank, 49 S. C. 427, 436 (*semble*, that if a husband alone executes a mortgage, which is foreclosed after his death, the widow's rights are only against the land).

[2] See Moore *v.* Mayor of New York, 8 N. Y. 110.

[3] Simar *v.* Canady, 53 N. Y. 298 (the wife has an action against one who fraudulently induced her husband and herself to convey); Porter *v.* Noyes, 2 Me. 22 (the existence of the right defeats a covenant to give an unincumbered title); Buzick *v.* Buzick, 44 Ia. 259 (the wife can bring a bill to protect it from fraud). See, also, Clifford *v.* Kampfe, 147 N. Y. 383; Sykes *v.* Chadwick, 18 Wall. (U. S.) 141.

[4] Simar *v.* Canady, *supra*, 304. *Contra*, Virgin *v.* Virgin, 189 Ill. 144, 151.

[5] Snow *v.* Stevens, 15 Mass. 278. *Contra*, *In re* Thompson's Estate, 6 Mackey (D. C.) 536.

[6] 4 Kent, Com., 43, 44.

[7] Grube *v.* Lilienthal, 51 S. C. 442.

[8] Newhall *v.* Lynn Savings Bank, 101 Mass. 428.

[9] For weaker grounds, see George *v.* Hess, 48 W. Va. 534; Kauffman *v.* Peacock, 115 Ill. 212.